SUPREME COURT, U. S.

OCT. 29 1969

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NO. 497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

UNION PACIFIC RAILROAD COMPANY, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

On Appeal from the United States District Court for the District of Nebraska

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BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

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Appellees ask that this Court not hear argument on the premise that the case presents merely a dispute between railroads over complex questions within the discretion of the Interstate Commerce Commission (U. S. Motion; p. 9; C&NW Motion, pp. 19-20). This misstates the primary issue in this appeal.

This is not a case in which the Commission has, in its discretion, weighed the effect of its order on the interest of the public and the railroads in efficient freight car utilization. The question presented here is one of statutory construction arising from the unusual circumstance that the Commission has admittedly refused to consider, on the ground that it was irrelevant, the impact that its order prescribing a time-mileage system of freight car rentals would

have on the nation's car supply. The Commission refused to exercise any discretion to consider this critical subject because it erroneously read the statute as precluding consideration of car supply factors in a "basic per diem" case.

Penetrating the fog of administrative "expertise" with which appellees would surround the case, the following propositions emerge:

> (1) This country is confronted with an increasingly serious car supply problem;
>
> (2) Evidence in this record shows that a time-mileage system of freight car rentals would substantially worsen the existing car supply situation; and,
>
> (3) The Commission has not given any consideration, in this case or in any other case, to the adverse impact that its prescription of a time-mileage system would have on car supply.

Nothing in the opinions of the Commission and the court below even purports to challenge the evidence showing the adverse consequences of a time-mileage system on the car supply. Instead, the Commission held that the car supply considerations supporting the present time basis of determining freight car rentals, "however beneficial," could not be considered in determining this case (332 I.C.C. at 223; App. E, p. 86a). And the opinion of Judge Robinson below sustained the Commission's theory that "car supply factors have no relevance" (App. B, p. 25a). Such holdings simply cannot be reconciled with the requirement of the 1966 amendment of Section 1(14)(a) of the Interstate Commerce Act that, in any proceeding in which the Commission fixes the "compensation to be paid for the use of [freight cars], . . . the Commission *shall* give consideration to . . . factors affecting the adequacy of the national car supply." (Emphasis supplied.)

Appellees attempt to avoid the plain language of the statute on the theory that Congress intended existing law with respect to "basic per diem" to remain unchanged (U.S.

Motion, pp. 6, 11-12). But even assuming, arguendo, that the 1966 amendment did not change existing law, the Commission's refusal to consider the adverse impact that a time-mileage structure of car rentals would have on car supply cannot be justified. Prior to the 1966 amendment of Section 1(14)(a), it had been uniformly recognized by the Commission and the courts that car supply consequences were properly considered in adopting a time basis rather than a mileage or time-mileage basis of car rental rates. *Rules for Car-Hire Settlement*, 160 I.C.C. 369, 374-375 (1930), affirmed in relevant part sub nom. *Chicago, R. I. & P. Ry Co.* v. *United States*, 284 U.S. 80, 90, 102-103 (1931); *Palmer* v. *United States*, 75 F. Supp. 63, 68 (D.D.C. 1947); see also *New England Divisions*, 62 I.C.C. 513, 538 (1921). Appellees cite no case, and we know of none, in which the Commission or the courts had previously held that the effect on car supply of an order prescribing freight car rentals was irrelevant.[1]

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[1] The decision in *Boston & Maine R. Co.* v. *United States*, 162 F. Supp. 289 (D. Mass. 1958), appeal dismissed, 358 U.S. 68 (1958), was entirely consistent with the prior holdings. The Commission's error in that case was its refusal to consider and make findings with respect to a proposal that there be a different per diem charge for each railroad, reflecting the average mileages of cars over each railroad (162 F. Supp. at 297) (referred to as a "time-mileage plan," although differing from the separate computation of miles for each car prescribed by the Commission in the present case). The court did not even suggest that the Commission could not continue to consider the impact on car supply of an order prescribing car rentals, holding (162 F. Supp. at 298):

> "We do not say, for it is not our function to say, that the time-mileage plan proposed is fair and practical and ought to be adopted. What we do say is that the plan deserves more than the cursory consideration given to it by the Commission, for without more detailed findings by it we cannot exercise our judicial function."

In the present case the Commission has committed the same error by going to the opposite extreme in refusing to consider and weigh car supply factors in determining the structure of car rentals.

Appellees attempt to overcome the deficiency in the Commission's action in the present case by repeated references to the so-called *Incentive* case (U.S. Motion, pp. 6-7, 9, 13-14; C&NW Motion, pp. 12, 22-23, 26). But the effect of a time-mileage system on car supply was not considered in that case in which no one ever suggested the prescription of a time-mileage system and the Commission made no reference to the subject.[2] Railroad appellants are driven to the assertion that: "At neither stage [the basic per diem case or the incentive case] is the impact on car supply of the time-mileage system necessarily relevant" (C&NW Motion, p. 25). This is an untenable position in light of the statutory requirement that in fixing compensation for the use of freight cars, "the Commission shall give consideration to . . . factors affecting the adequacy of the national freight car supply."

Appellees also attempt to brush aside the effect of the Commission's order on the national car supply by characterizing the whole case as merely an intra-railroad dispute in which some railroads want high rental rates, other railroads want low rental rates, and the Commission cannot be expected to please everyone (U.S. Motion, pp. 3-4, 9-10; C&NW Motion, p. 4). The question before the Commission with respect to the time-mileage system was not whether the payments were too high or too low, but whether structuring the payments on a separate time and mileage basis inherently operated as a deterrent to efficient car utilization

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[2] The briefs of the railroads filed in the *Incentive* case (cited in C&NW Motion, p. 27, n. 23) were not discussing the time-mileage system and properly assumed that the impact of such a system on car supply would be considered by the Commission in the present case which was then pending and in which a time-mileage proposal was at issue.

(see J.S. pp. 9-10).[3] And the question before this Court is not whether the rates are too high or too low, but whether the Commission violated the express command of Section 1(14)(a) when it refused to consider, as irrelevant, the uncontroverted evidence showing that the prescribed time-mileage basis would seriously worsen an already critical freight car shortage.

Appellees are incorrect in asserting that appellant railroads are all "creditor roads" and are therefore appealing because of their self-interest in higher car rental rates (U.S. Motion, p. 11; C&NW Motion, p. 17). To the contrary, seven of the twenty-two appellant railroads are debtor roads.[4] Whether debtors or creditors, all appellants are basically aggrieved by the impact of the time-mileage system, not merely because of their rental receipts or payments, but because of their concern over freight car shortages that prevent them from obtaining the freight cars necessary to originate freight shipments. Inability to meet the demands of the freight shippers also means the loss of freight revenue, whether the carrier shows a debit or credit in its balance of rental payments and receipts.

This case is important because of the effect the Commis-

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[3] The table set forth by the Government showing car rentals on cars "if moved the average number of miles shown by the 1960 study" (U.S. Motion, p. 15, n. 9) is completely nonresponsive. The whole point of the evidence relied upon by appellants is that the time-mileage system would operate to reduce the utilization of the cars. The Government's table assumes, contrary to the uncontroverted evidence of record, that freight cars will continue to move the same number of miles per day despite the disincentive effect that a separate mileage charge would have on the movement of cars.

[4] This is shown in Schedule 376 of the Annual Reports for 1968 filed by appellants with the Interstate Commerce Commission.

sion's order would have in aggravating freight car shortages. The Government acknowledges that this case involves "a matter of obvious importance to the nation's railroads" (U.S. Motion, p. 10). It is equally obvious that the case involves a matter of great importance to the nation's freight shippers and thus to the national economy. Congress acted in 1966 to amend Section 1(14)(a) because, as the House Committee stressed in reporting the bill which was enacted: "Something must be done to meet the needs of the shippers and the public and of the country" (H. Rep. No. 1183, 89th Cong., 1st Sess. 2). When Congress said that "something must be done" and amended Section 1(14)(a), Congress certainly did not contemplate a Commission order which would aggravate the car supply problem while rejecting consideration of car supply as irrelevant.

The Government's sole reason for asking this Court to refuse to hear argument in this obviously important case is that "there is little that the courts can do to assist the Commission in its efforts to solve this vexatious problem" (U.S. Motion, p. 10). This is not so. If, as appellants contend, the Commission has misconstrued Section 1(14)(a) in rejecting as irrelevant any consideration of the adverse impact of its order on the nation's car supply, it is the duty of the courts under Section 10(e) of the Administrative Procedure Act to set aside agency action found to be contrary to the governing statute (5 U.S.C. § 706). The courts, not the agencies, "are the final authorities on issues of statutory construction." *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968). See also *FTC* v. *Colgate Palmolive Co.*, 380 U.S. 374, 385 (1965). And it is especially important that this Court decide the issue of statutory construction where, as here, no two judges have as yet agreed upon the proper

construction of Section 1(14)(a) in this case of first impression.[5]

The Commission is the agency having jurisdiction to prescribe car rental rates, but its decision must be in accordance with the governing statute. And that statute must be construed to give effect to, not frustrate, the intent of Congress as expressed in plain statutory terms. If this Court decides that the statute means what it says in requiring that the Commission *shall* consider the impact of any order prescribing car rental rates upon the freight car supply and thus may not refuse to consider the subject as irrelevant, the result on remand will be that the Commission will obey the statute thus construed and will not again issue an order which has the effect of worsening already serious car shortages without ever having taken any account of the effect of its order on car supply.

Thus, contrary to the Government's argument, this Court can make a significant contribution to the national interest

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[5] The Government errs in asserting that Judge Lay agreed with Judge Robinson in holding that the Commission had in effect considered car supply factors in the *Incentive* case (U.S. Motion, p. 9). Judge Lay did not hold that the Commission had already considered car supply factors, but proceeded on the premise that the Commission has a mandatory duty to prescribe an incentive element in the future and would do so very promptly unless the Commission finds that no car shortage exists or that an incentive element would not contribute to sound car service practices (App. C, pp. 32a-33a). Commission counsel rely upon Judge Lay's vote, but in asserting complete Commission discretion, they reject his conclusion that the Commission has a mandatory duty to prescribe an incentive element. Commission counsel thus seek affirmance on a theory consistent with the opinion of but one of the three judges.

The need for definitive construction of the statute is, itself, a compelling reason for plenary review by this Court.

in an adequate freight car supply by construing Section 1(14)(a) in accordance with the manifest intent of Congress. Surely this Court will not shirk its responsibilities by declining even to hear argument on a substantial question of statutory construction in a case of such great importance to the railroads, the shipping public and the national economy.[6]

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[6] Just as the construction of the governing statute is the proper function of this Court, the further question presented (J.S. p. 3) involves the entirely judicial function of determining whether the Commission's action with respect to the rate of return on freight cars was supported by evidence. Contrary to the Government's assertion that this determination was "peculiarly for the Commission's broad discretion" (U.S. Motion, p. 16), the question presented has nothing to do with discretion, but with the existence of evidence to support the Commission's action (J.S., pp. 18-19).

CONCLUSION

For the foregoing reasons and the reasons set forth in the Jurisdictional Statement, the questions presented by this appeal are important and substantial. Probable jurisdiction should be noted.

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